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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 UNITED STATES OF AMERICA,

4 v.

15 Cr. 769 (AJN)

5 YURI LEBEDEV and TREVON GROSS,

6 Defendants.

Jury Trial

7 -----x

8 New York, N.Y.

9 March 15, 2017

8:33 A.M.

10 Before:

11 HON. ALISON J. NATHAN,

12 District Judge

13 And A Jury

14 APPEARANCES

15 PREET BHARARA

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16 Southern District of New York

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24 BY: HENRY E. KLINGEMAN

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(In open court; jury not present)

THE COURT: Good morning everyone. Please be seated.

Ms. Madrigal, I know that Mr. Creizman is apparently stuck underground.

MS. MADRIGAL: Yes, your Honor.

THE COURT: But we'll proceed with you here, and everyone else --

MS. MADRIGAL: Thank you.

THE COURT: -- is here.

So I think what I have is a combination of good news and bad news. I'll start with what I know about the sick juror, backup, make a full record of the juror communications over the day yesterday when the courthouse was closed for the snowstorm, and then I'll hear from you as to any proposed course of action.

First, and just cutting to the end of the saga, the sick juror did e-mail Ms. Nuñez early this morning saying, "I'll be coming and will bring Advil with me to reduce the fever until I can go in Urgent Care."

So the good news is she's coming. The bad news is that she sounds like she's ill.

Backing up. Ms. Nuñez received an e-mail yesterday afternoon from this juror indicating as follows, "I know we don't have sick days and you probably don't know yet if we're coming in tomorrow. Unfortunately, I caught a stomach virus

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1 and have been in bed since yesterday. I have not been able to  
2 clear out my car yet until my fever goes down but I also don't  
3 want to give a lot of excuses either. Please let me know what  
4 I can do because I cannot go to Urgent Care now due the weather  
5 conditions."

6 In response, at my direction Ms. Nuñez sent the  
7 following message back to the juror. "I'm sorry to hear you  
8 aren't feeling well. Hopefully, you'll feel better in the  
9 morning. The judge has told me to let all jurors know that the  
10 jury will be deliberating as planned at 9:30 a.m. tomorrow.  
11 Since all jurors are needed to deliberate, the judge asked that  
12 everyone leave additional time as needed in light of the  
13 weather to make it to the courthouse by 9:30.

14 "If you feel so ill in the morning that you think you  
15 cannot make it, please let me know as early as possible. In  
16 that case the judge will need to schedule a call with you and  
17 the lawyers and the court reporter."

18 The juror responded that she would be in touch with  
19 Ms. Nuñez early in the morning with an update. In the  
20 meantime, I also asked Ms. Nuñez to inform all jurors that we  
21 would be proceeding today at 9:30 and to please leave  
22 additional time as needed in light of the weather to make it to  
23 the courthouse by 9:30 a.m. today. All but the sick juror  
24 indicated that they would do so and they would be here.

25 At that point yesterday my -- my law clerk at my

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1 direction e-mailed all of you indicating -- informing you of  
2 the sick juror issue that was developing and ordering you to be  
3 here at 8:30 a.m. to address the issue as needed.

4 Mr. Klingeman responded requesting on behalf of  
5 Mr. Gross that an alternate be summoned to the courthouse as a  
6 precaution.

7 I asked Ms. Nuñez to contact the first and second  
8 alternates, that's jurors nos. 13 and 14, to alert them to the  
9 possibility that they might be needed to be here today. As my  
10 law clerk informed you by e-mail, the first alternate indicated  
11 he was unable to be present today because his wife is  
12 undergoing a colonoscopy and he is accompanying her. The  
13 second alternate indicated that she could be here and, as  
14 noted, the information was conveyed to you by e-mail by my law  
15 clerk.

16 This morning Ms. Nuñez received the e-mail from the  
17 sick juror that I read when I sat down here a moment ago  
18 indicating that she's coming but that she is sick.

19 In light of her indication of continuing sickness I  
20 did direct Ms. Nuñez to instruct alternate number two to come  
21 to the courthouse by 9:30 as a precaution. She will be  
22 directed to a separate room and not in contact with the other  
23 jurors without further direction.

24 There is an additional piece of information that is in  
25 this mix from a different juror.

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1 Another juror contacted Ms. Nuñez by e-mail yesterday  
2 while the courthouse was closed for the storm. She indicated,  
3 as I believe that she did during jury selection, that she has  
4 tickets on March 19, that's Sunday, I believe, to chaperone a  
5 group of students to Montreal for eight days. She said the  
6 following, "Given the snowstorm and pacing of deliberations I'm  
7 starting to get a little nervous so just wanted to put this on  
8 your radar."

9 That's where we are.

10 So, I think the immediate question is whether I should  
11 take some further steps with the sick juror to assess her level  
12 of sickness, whether she should be sent into the jury room. My  
13 concerns are just the impact on her, whether she'll be able to  
14 complete deliberations and, of course, the potential  
15 contamination of other jurors.

16 So that I think is the immediate issue. The other  
17 juror issue I think puts in some perspective that if we're not  
18 completed by this week we will certainly be in a position -- I  
19 will have to excuse that juror, I believe, and we'll be in the  
20 position of needing to either sub in an alternate at that point  
21 depending on feasibility and the like after three additional  
22 days of deliberation or proceed with eleven. So that's where  
23 we are.

24 Go ahead.

25 MS. CHOI: Your Honor, I think the government's

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1 position would be that you should inquire further about the  
2 status of the sick juror and determine whether or not, in  
3 fact -- I mean it seems as though from the e-mail this juror is  
4 feeling significantly better, at least not -- is not bedridden  
5 anymore. Obviously she's still under the weather. But I think  
6 if your Honor could make the -- make further inquiry as to how  
7 she's feeling, whether or not she could continue deliberating  
8 today or if she could go to the doctor and perhaps tomorrow and  
9 it may be that she feels she could make some assessment about  
10 that.

11 This is our concern about this. The jury has already  
12 had the case for over a day-and-a-half.

13 THE COURT: Just to pause you. I was thinking about  
14 it. It went to them at 1 p.m. on Friday. They ended that day  
15 at 4:40, I believe. And then Monday 9:30 to 3:15 so not quite  
16 a day-and-a-half at this point.

17 MS. CHOI: Approximately a day-and-a-half, give or  
18 take, sorry about the math. But I think the point is they  
19 would have to start all over again with the new jury in order  
20 to do that.

21 Now we're in the situation which we don't know I think  
22 that the other juror that suggested that she had the Sunday --  
23 that stated she had the Sunday tickets has some concern but we  
24 don't know what the other juror situations are and I think if  
25 we start -- if there is a possibility that we'd have to start

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1 all over again and then take out an alternate and then have --  
2 have them have to start from square one, we're going to be in a  
3 worse position in terms of making sure that we can go forward  
4 than if we were to find out from this particular juror, the  
5 sick juror, that she could potentially continue if she was  
6 either given a little time this morning to go to the doctor or  
7 even if it is to start tomorrow morning that's still less time  
8 lost than to start all over from ground zero. So that's the  
9 government's view.

10 Obviously we don't have a good assessment, I don't  
11 think your Honor knows either, with regard to, you know,  
12 whether or not she's ill and could make other people sick.  
13 That's obviously a concern. But if it is, in fact, something  
14 like the stomach flu those aren't bugs that usually last more  
15 than a short period of time.

16 So I think the government, in the first instance,  
17 would like further query of that particular juror.

18 This isn't the situation where she said she couldn't  
19 get up out of bed and come here. She's obviously, as all the  
20 jurors have been, very diligent and conscientious and is coming  
21 here on time despite the fact that she's under the weather. So  
22 I think we should at least query as to what -- how she's  
23 feeling and whether or not she thinks she can continue today  
24 before we make any decisions about whether or not to start the  
25 jury off again with an alternate.

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1 MR. KLINGEMAN: Good morning, your Honor.

2 THE COURT: Good morning.

3 MR. KLINGEMAN: I agree with the government and the  
4 Court about inquiring further of this juror to assess her  
5 condition.

6 If, however, she's unable to continue I would urge the  
7 Court to seat an alternate and continue the deliberations.  
8 We're really running into a scheduling issue. If we were to  
9 take today off we would only have two more days this week.  
10 Then we would likely lose the second juror your Honor has  
11 mentioned. So I would ask that we continue, make every effort  
12 to continue the deliberations so that we have three full days  
13 this week at our disposal.

14 THE COURT: Mr. Creizman.

15 MR. CREIZMAN: Yes. I just arrived. As I think  
16 everyone in the court knows, I was stuck on a Metro-North  
17 train, which is horrible. I just can't get it out.

18 But if the alternate is seated, I think that the jury  
19 has to be instructed they have to start over.

20 THE COURT: They do. They do.

21 The brief version, Mr. Creizman, to catch you up, is  
22 that the juror is coming. I think this is the highlight. The  
23 juror is coming. But she apparently has a fever and wants to  
24 get to Urgent Care when she can, wants to see a doctor when she  
25 can.



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1           So my proposal, and at least with respect to this the  
2 government and Mr. Klingeman agrees, I should take her into the  
3 robing room with the court reporter and assess her level of  
4 sickness and whether she feels like she can proceed for the  
5 day. If she can, then that's what we'll do.

6           And the question is what should we do if she can't? I  
7 do have an alternate coming as a precaution. And that person  
8 will be here and in a separate room until further instruction.  
9 So that person will be here.

10           The additional piece of information is that another  
11 juror, I believe mentioned this during selection, but has  
12 tickets to Montreal on Sunday to chaperone a group of students  
13 for eight days. So if they're not done by Friday we will lose  
14 another juror because given that she flagged this issue I have  
15 to excuse her.

16           So the difficult question is if the sick juror is  
17 unable to proceed today. And the choice of whether to pause  
18 deliberations, let her go get some care and resume with her; or  
19 proceed with an alternate; or potentially, just putting all  
20 options on the table, proceed with eleven, I think are what  
21 we're faced with.

22           My concern with pausing deliberations or proceeding  
23 with eleven at this point is that we will lose another juror  
24 come this weekend. So the more we delay deliberations I think  
25 the more likely the eventuality that we lose another juror.

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1           So I think to spin it out though I will have to  
2     instruct the jurors if we do sub in an alternate that they must  
3     restart their deliberations. It will be after only the time  
4     that they deliberated on Friday and Monday that will be lost.  
5     If I were to bring in an alternate come Monday it's three  
6     additional days of deliberation. If we were to pause for half  
7     a day or a day -- I mean this jury still has not had a full day  
8     of deliberations and they need it, of course.

9           Ms. Choi.

10          MS. CHOI: One other sort of pragmatic suggestion  
11     which would be to just query if there are other foreseeable  
12     conflicts over the course of the next week or so. I think it's  
13     just better for us to know which way this is going to go if  
14     there is some concern that it could spill over into week two  
15     and there are some other conflicts beyond the Sunday trip to  
16     Montreal just so that we sort of get the full picture.

17          I mean obviously things like sickness we can't foresee  
18     but there may be other issues that initially we didn't -- we  
19     didn't or the jurors didn't think were going to really come to  
20     be a real true conflict and you know I think we need to know  
21     that, especially if, for instance, there are continuing issues  
22     with childcare where people have to be dismissed at 3:30 or  
23     other things where we've been -- I think your Honor has been  
24     good about accommodating the jurors' schedules as best possible  
25     but it may be the time to sort of figure out whatever else

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1 might be on the horizon.

2 I'm just trying to be pragmatic here, your Honor,  
3 because of the concern that you know already juror number one  
4 had another issue which may not preclude him if he were to have  
5 to sub in later but obviously we should be at least cognizant  
6 of the real possibility that there could be other issues that  
7 we'll need to deal with and then -- we can go to eleven but  
8 obviously beyond that we can't really do, so.

9 THE COURT: We can't do. No. That's right.

10 MR. KLINGEMAN: I leave it up to you, your Honor,  
11 whether to do that. I completely sympathize with counsel's  
12 point. I wonder if this would invite some things that we don't  
13 want to deal with.

14 I would suggest or request if your Honor could  
15 consider reminding the alternates to make themselves available.  
16 I'm not suggesting alternate no. 1's issue today is anything  
17 but totally justifiable. Having recently turned 50 myself, I  
18 am completely sympathetic. But the alternates are a critical  
19 part of this and we may need them. So if we want to send them  
20 a hint to kind of be around, that be would great.

21 THE COURT: Two of them now have a hint. One of them  
22 will be sitting in the courthouse this morning. But we can  
23 address -- we can address at some point today whether the other  
24 two should be reminded of their potential continuing role. I'm  
25 certainly open to that.

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1           We're hearing from a couple of jurors of just some  
2           transportation issues. Everybody appears to be on their way  
3           but someone is on a train stuck on the tracks. I don't know if  
4           that's Mr. Creizman's train or not. All of that to say we  
5           might not have twelve by 9:30 in any event.

6           So we have agreement that I'll -- I will ask Ms. Nuñez  
7           to grab the sick juror on her way in, ask her to come into the  
8           robing room. I'll speak to her with the court reporter to get  
9           a sense of how sick she is and whether she can continue. And  
10          then I'll report back. I guess I think we should come to --  
11          probably should come to resolution on the -- use this time as  
12          to how to proceed.

13          MS. CHOI: It's a tricky one, your Honor.

14          THE COURT: It sure is.

15          MS. CHOI: I don't know if you -- I mean it's still I  
16          guess 8:53, if you wanted us to stick around until she arrives;  
17          if you wanted us to come back at 9:30, what you wanted us to  
18          do.

19          THE COURT: I'll have you stay.

20          MS. CHOI: Okay.

21          THE COURT: I'll have you stay. I think I want to --  
22          hopefully it will be futile but I think it's worth using this  
23          time for me to come to resolution on what we'll do if she can't  
24          proceed.

25          MS. CHOI: I'm sorry. I didn't mention that Mr. Noble

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1 is in fact also home sick with the flu so I hope your Honor  
2 will excuse his absence. It was a long four weeks.

3 THE COURT: For everyone.

4 I guess -- I think my basic inclination, though I  
5 think it's close, is if she can't proceed that we bring in the  
6 alternate this morning with a standard instruction to the  
7 jurors that they have to restart deliberations and -- as I say,  
8 it's close. Any additional time we build into the  
9 deliberations this week increases the likelihood that they  
10 don't get the job completed this week. I'd rather have an  
11 alternate come in now than on Monday.

12 MS. CHOI: Understood, your Honor.

13 We should just see what her status is and keep our  
14 fingers crossed.

15 THE COURT: Mr. Creizman, what do you think if she's  
16 unable to sit.

17 MR. CREIZMAN: I believe that seating an alternate  
18 would be appropriate just so that the jurors can get back going  
19 with deliberations whether they -- even starting over again at  
20 least I think it makes sense to keep this process going.

21 THE COURT: Mr. Klingeman, I think you -- from what  
22 you indicated you agree with that.

23 MR. KLINGEMAN: Yes, please.

24 THE COURT: If we're seating an alternate -- again, so  
25 as to avoid any delay we should get agreement on the

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1 instruction. I have a sample from Pattern Jury Instructions,  
2 Criminal Pattern Jury Instructions Treatise. I don't know if  
3 there is a Sand charge -- no.

4 The Pattern instruction reads, "One of your fellow  
5 jurors has been excused and an alternate juror is replacing the  
6 excused juror. Do not consider the substitution for any  
7 purpose. Under the law the alternate juror must participate  
8 fully in the deliberations that lead to any verdict. The  
9 prosecution and the defendants have a right to a verdict  
10 reached only after full participation of the jurors whose votes  
11 determine that verdict. This right will only be assured if you  
12 begin your deliberations again from the beginning. Therefore,  
13 you must set aside and disregard all past deliberations and  
14 begin your deliberations all over again. Each of you must  
15 disregard the earlier deliberations and decide this case as if  
16 those earlier deliberations had not taken place. Now please  
17 return to the jury room and start your deliberations from the  
18 beginning."

19 Boy is that redundant when you read it out loud. Let  
20 me try a streamlined version.

21 A more streamlined version would make the basic point  
22 only two times rather than four. So, one of your -- the intro  
23 language. "Don't consider the substitution for any purpose  
24 under the law. The alternate juror must participate fully in  
25 the deliberations that lead to any verdict. The prosecution

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1 and the defendants have the right to a verdict reached only  
2 after full participation of the jurors whose votes determine  
3 that verdict. This right will only be assured if you begin  
4 your deliberations again from the beginning. Now please return  
5 to the jury room and start your deliberations from the  
6 beginning."

7 MS. CHOI: No objection from the government. It makes  
8 the point clear, I think, your Honor.

9 MR. KLINGEMAN: Agreed.

10 MR. CREIZMAN: No objection.

11 MR. KLINGEMAN: Your Honor, may I ask which number  
12 juror are we talking about? Actually I've never caught that.

13 THE COURT: I haven't said. I can. I wanted the  
14 discussion to be in the abstract because I think hearing your  
15 views without the specific juror in mind is -- you're entitled  
16 to know but I did want to hear your views without telling you  
17 which juror, and I have. So it's juror number three.

18 We have our plan. I will speak to the juror as she  
19 comes in the robing room with the court reporter and come back  
20 to you with information and we've discussed how we'll proceed  
21 if she's unable to proceed.

22 Anything else folks?

23 MS. CHOI: Not from the government.

24 MR. CREIZMAN: No, your Honor.

25 THE COURT: All right. Thank you.

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(Recess)

(In the robing room)

THE COURT: Hi, Ms. Pico. How are you? Come have a seat. I know you're not feeling well. I'm so sorry.

JUROR: That's okay. I just took two Advils.

THE COURT: Does that help?

JUROR: Yeah, to reduce the fever.

THE COURT: So what I'm trying to gauge is whether you can do this. Obviously I don't want you to be harmed.

JUROR: No. But I found out that there was an Urgent Care not far so if I know that my fever is getting worse I'll let them know. But I can comprehend.

THE COURT: You can?

JUROR: Yes.

THE COURT: And you feel like you can keep going?

JUROR: Yeah, I can. I mean I already know my decision and everything but we all got to go work together.

THE COURT: Yeah, I don't want to hear where you are in that. But I'm very grateful for you and your commitment to being here even though you are sick. I'm sorry to hear that. I'll ask just that you'll let me know if you can't continue.

JUROR: No. I know. That's the same thing my parents told me. As long as I keep on top of the Advil and the hours I have to take them I'll be fine.

THE COURT: Maybe at the end of the day if you're not



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1 done you can go to Urgent Care. Does that seem to be a  
2 possibility?

3 JUROR: Yes, because I found one when I got off the A  
4 train but they weren't open.

5 What I was going to suggest is it possible I can get  
6 like a Lysol because I know one of the jurors is pregnant and I  
7 don't want to get her sick.

8 THE COURT: Yeah, we'll get some Purell and if you  
9 could just keep physically to yourself a little bit I think  
10 that will help.

11 JUROR: Yes, just to prevent her from getting sick.

12 THE COURT: Of course. We'll bring in -- Ms. Nuñez  
13 has a variety of disinfectant products. We'll bring those in.  
14 Is there anything else that would make you comfortable?

15 JUROR: Just staying with liquids for now and I'll be  
16 fine.

17 THE COURT: Thank you so much. I'm really grateful.  
18 Thank you, Ms. Pico. You may return to the jury room.

19 (In open court)

20 THE COURT: Good news. She says she can continue.  
21 She tried to get to the Urgent Care office before, but they  
22 weren't open yet. She's going to take Advil. She's asked for  
23 some disinfectant products and I'm hereby asking Ms. Nuñez.  
24 She's concerned about the other jurors. So we'll provide her  
25 some Purell and if we have Lysol or wipes or the like so that

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1 she can help make sure that no one else is infected. She'll  
2 continue taking Advil. And I just ask that she let me know if  
3 she thinks she can't make it and suggested that if they're not  
4 finished their task by the end of the day she could go to  
5 Urgent Care then and the like. So that's where we are which is  
6 good news.

7 Anything further?

8 MR. KLINGEMAN: No, your Honor. Thank you.

9 MS. CHOI: No, your Honor. I presume today obviously  
10 if she needs to go to the doctor she should go to the doctor  
11 but that your Honor generally would not be opposed to the  
12 jurors staying later if they are all able to do so.

13 THE COURT: I have now indicated that option for the  
14 other two days they have sat. If we get a note I'll remind  
15 them that they should just let us know when they want to stop  
16 for the day, I think I'll say at 5 o'clock, but if they want to  
17 continue they should let us know. I think we'll hear from  
18 them -- I said to the juror I have to trust that she'll let me  
19 know if she can't continue. So we'll hear from them if not.

20 And if I don't hear from them by note or otherwise  
21 then I'll just assume that they have that -- that they have  
22 that information from the prior two times.

23 In light of where we are, I'll -- I'm prepared to  
24 instruct Ms. Nuñez to tell the alternate who is either here or  
25 on her way that she need not come. Everyone agree?

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1 MR. KLINGEMAN: Yes.

2 MR. CREIZMAN: Yes, your Honor.

3 THE COURT: Please let her know, Ms. Nuñez. Thank  
4 you.

5 Anything else?

6 MS. CHOI: Just as a logistical matter. The work goes  
7 on. We have court appearances later this week and I just  
8 wanted to get a sense from your Honor how you wanted us to deal  
9 with them, if you wanted us to ask for adjournments in  
10 anticipation.

11 THE COURT: I want people here at the drop of a dime.  
12 So somebody has got to be available because I want no delay in  
13 responding to questions.

14 MS. CHOI: Understood.

15 So we will make appropriate adjournment requests.

16 THE COURT: Yes.

17 I don't need all three of you but I need one of you.

18 MS. CHOI: We're already down one so I think we would  
19 prefer that all three of us be here or at least two so we'll  
20 make the arrangements for that to occur.

21 THE COURT: Okay. All right. Thank you everyone.

22 I think the only other thing I'd say is just again for  
23 efficiency because we may face the alternate issue, you know,  
24 if anyone wants to propose any different instruction if we need  
25 to do that, also consider and know the relevant law with

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1 respect to when there might be good cause for proceeding with  
2 eleven or agreement to proceed with eleven and the like. Just  
3 thinking through these eventualities will aid us if we need to  
4 get there without producing any further delay.

5 MS. CHOI: Understood, your Honor.

6 Would it be all right if Mr. Rosen could e-mail us  
7 your proposed edited say-it-only-two-times-not-four-times and  
8 then we'll go back to appeals and make sure there aren't any  
9 issues with that and start exploring the eleven-juror issue.

10 THE COURT: We'll docket what I read so everyone has  
11 it and, as I say, that was done quickly. I'm open to different  
12 or better suggestions.

13 Thank you everyone.

14 MS. CHOI: Thank you, your Honor.

15 THE COURT: Wait to hear.

16 (Recess pending verdict)

17 (At 12:15 p.m. a note was received by the jury)

18 THE COURT: We have a note from the jury which we'll  
19 mark as Court Exhibit 5.

20 "Your Honor, we have a question with regards to  
21 establishing 'venue' as it relates to both substantive and  
22 conspiracy charges. Is where the money is spent or where it  
23 could be spent, based upon previous spending habits, a fair  
24 measure in establishing venue?

25 "Best regards.

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1 "Juror no. 2 on behalf of the jury."

2 MR. KLINGEMAN: Your Honor, would you mind repeating  
3 that.

4 THE COURT: Of course.

5 "We have a question with regards to establishing  
6 'venue' as it relates to both substantive and conspiracy  
7 charges. Is where the money is spent or where it could be  
8 spent, based upon previous spending habits, a fair measure in  
9 establishing venue?"

10 Maybe what it makes sense for me to do is for me to  
11 step down for a few moments and we all noodle a bit on an  
12 appropriate response.

13 I wanted to raise one thing that was -- came into my  
14 head after I left the bench earlier regarding something that  
15 the juror who I met with said to me. Of course there was a  
16 court reporter, but I hadn't focused on this point because it  
17 didn't pertain to whether she could sit or not.

18 She said at one point something like: I know my  
19 decision but we've all got to go work together. And I said  
20 immediately I don't want to hear that. And she never said  
21 anything further regarding her thinking or the jury's thinking  
22 other than that statement.

23 I don't -- it doesn't change, in my view, anything  
24 about how we are proceeding and I don't think it requires any  
25 addressing otherwise but after I left the bench it started

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1 bugging me that I hadn't just included it in my recitation of  
2 what occurred. So I'll leave you with that.

3 I'll just -- we'll take this note, as I say, noodle  
4 for a few moments, and then I'll come back for proposals as to  
5 how to address. All right. Thank you.

6 (Pause)

7 THE COURT: Just a moment.

8 If you have a proposal in the meantime, I'm happy to  
9 hear it.

10 Mr. Shin.

11 MR. SHIN: Your Honor, the government's position here  
12 is that the question is either too vague or too ambiguously  
13 written for us to I think precisely ferret out what the  
14 question is and so I don't think we can give a definitive  
15 answer unless we make assumptions about what they're saying,  
16 which we're reluctant to do. So we would propose that your  
17 Honor simply instruct them to refer to the jury instruction and  
18 the charge, the supplement that was given the other day as  
19 being the guidance for their question.

20 Just in terms of what I mean by the question being  
21 ambiguous, they say where the money is spent. What is the  
22 money? There's lots of different money in this case. And in  
23 terms of where it's spent or could be spent. And then the  
24 further measure question also is quite vague. And so given  
25 that we can't have a back and forth asking them to clarify

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1 specifically, I think the best -- the most prudent course would  
2 be to refer back to the previously given charges.

3 THE COURT: Mr. Klingeman.

4 MR. KLINGEMAN: Your Honor, I would submit that the  
5 spending of bribe proceeds is not an act in furtherance of  
6 either the act of bribery or the crime of bribery or a  
7 conspiracy to participate in bribery. And, therefore, I would  
8 answer the question in the negative.

9 And I would refer to the specific jury instructions  
10 that your Honor gave in the initial round and I would state the  
11 following and I'm quoting from the jury instructions.

12 "As to the conspiracy charges, venue is proper in this  
13 district if any of the defendants or their coconspirators  
14 caused any act or event to occur in this district in  
15 furtherance of the offense and it was reasonably foreseeable to  
16 the defendant that you are specifically considering that the  
17 act would take place in the Southern District of New York."

18 Likewise, I would quote the same or the related  
19 language with respect to substantive offenses as you did when  
20 you further instructed the jury on Monday.

21 THE COURT: Mr. Creizman, do you have a view?

22 MR. CREIZMAN: I actually concur with Mr. Klingeman.  
23 I didn't understand the question so well but it sounded like  
24 what they're saying is spending bribe proceeds.

25 THE COURT: Well let me say -- I am inclined toward

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1 the second part of Mr. Klingeman's suggestion. I am not  
2 inclined toward directly answering because it is, as you  
3 suggested, Mr. Klingeman, making an assumption as to the  
4 meaning that -- and I'll just tell you the way that you just  
5 suggested it be read is not how I had read it. So I think at  
6 least multiple meanings are available.

7 I agree with the government's basic point that it's  
8 vague. I am also generally cautious around anything that would  
9 intrude on the jury's ultimate function of finding facts and  
10 applying the facts to the appropriate statement of the law.

11 So I think -- my suggestion would be some -- and I'll  
12 get your reaction, is to adopt the second part of  
13 Mr. Klingeman's suggestion and say -- read the question, here  
14 is how I can respond to it. First, in the jury charge at page  
15 64, lines 12 through 15, the Court instructed as to the  
16 conspiracy charges that venue is proper in this district if any  
17 of the defendants or their coconspirators caused any act or  
18 event to occur in this district in furtherance of the offense  
19 and it was reasonably foreseeable to the defendant that you're  
20 specifically considering that the act would take place in the  
21 Southern District of New York.

22 As to the substantive counts and maybe language like:  
23 I remind you in both instances, on pages 64, line 18 to page  
24 65, line 2: The Court instructed venue is proper in this  
25 district provided that any act in furtherance -- in furtherance



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1 of the essential conduct of the crime took place in the  
2 Southern District of New York. Again, the defendant you are  
3 considering need not specifically intended to cause an act --  
4 need not have specifically intended to cause an act or event to  
5 happen in this district or even know that he was causing an act  
6 or event to happen here as long as it was reasonably  
7 foreseeable to the specific defendant that such act would occur  
8 in this district and it, in fact, occurred.

9 And then I was thinking of reminding them of the  
10 supplemental instruction along the lines of finally in  
11 assessing the defendant's knowledge or what the defendant --  
12 well maybe just leaving it at that.

13 I was considering just reminding them of the  
14 instruction that in assessing what the defendant knew or  
15 reasonably could have known or contemplated you may consider  
16 all facts including any experience or background of the  
17 defendant that you may determine relevant.

18 My thinking, Mr. Shin, rather than just sending them  
19 back to all of the instructions, I wonder if they're sort of  
20 focused on the supplemental instruction about knowledge -- I'm  
21 not sure. I'm just not sure. And so I was thinking of, just  
22 as Mr. Klingeman suggested, reminding them of the basic concept  
23 which is you have to find an act in furtherance of the  
24 conspiracy occurred in the venue -- in the Southern District.  
25 And that's sort of point one.

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1 I've fleshed out the meaning of what's required with  
2 respect to the defendant's knowledge and I've told them that  
3 they can consider any facts they deem relevant in making that  
4 assessment.

5 MR. SHIN: Your Honor, that approach is sensible.  
6 Just if I could make a couple points. I think the Court is  
7 already there. But I just want to note for the record an  
8 additional reason not to attempt to more specifically answer  
9 this ambiguous question is that I think the answer, even if we  
10 interpreted the question any particular way, is not as  
11 clear-cut as Mr. Klingeman would suggest. So even if, for  
12 example, specific spending of bribe proceeds was not itself in  
13 furtherance, it could of course be relevant if it  
14 established -- if it helped the jury establish that a defendant  
15 or a particular coconspirator was located in the district at  
16 the time other acts in furtherance of the conspiracy took  
17 place.

18 But let's not go down this road and so I think your  
19 Honor's proposal is the correct one of reminding the jury of  
20 the basic principles in the current charge.

21 We agree it's not necessary to specifically read from  
22 the additional instruction that your Honor gave the other day.  
23 But perhaps your Honor could just remind them that that is also  
24 there even if your Honor -- even if your Honor doesn't read  
25 from it, just so that they don't forget that there's more than

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1 just the current instruction number 42 on pages 64 and 65, that  
2 there is also the supplement that your Honor read the other day  
3 and also provided them a copy of.

4 THE COURT: Go ahead, Mr. Klingeman.

5 MR. KLINGEMAN: Your Honor I would ask that the Court  
6 simply read the two sentences that your Honor began with. In  
7 other words, the sentence that begins on page 64, line 12 and  
8 ends on line 15 as well as the sentence that begins on page 64,  
9 line 18 and ends on line 20. And I would ask the Court not to  
10 read --

11 THE COURT: On line 20 at "York" basically.

12 MR. KLINGEMAN: "York," period. And I would ask the  
13 Court not to read the balance of that paragraph, either in  
14 whole or in part.

15 The question, leaving aside any ambiguity, appears to  
16 focus on whether spending is relevant to venue and the sentence  
17 that follows on -- beginning on line 20 goes to intent and  
18 knowledge and foreseeability which your Honor not only  
19 addressed in the initial jury charge but in the supplemental  
20 jury charge. And I don't want to draw any undue attention to  
21 that since that is not the focus of this particular question.  
22 I'd rather confine it to whether spending is relevant to either  
23 an act or an essential act in furtherance of the crimes which  
24 is in answer to the question.

25 I also -- I'm concerned now that we haven't defined

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1 essential act, the jury hasn't asked for a definition of  
2 essential act, but we haven't defined that for them. But I'm  
3 willing to leave that alone if we just go with the two  
4 sentences your Honor is inclined to give and not more.

5 MR. SHIN: Your Honor, on that point, the government  
6 is fine with reading -- with respect to the conspiracy charge,  
7 lines 12 through 15. However, I think it's an incomplete  
8 reminder, your Honor, on the substantive charge if your Honor  
9 were to only reads lines 18 to 20. The following sentence,  
10 which includes the concept of reasonable foreseeability, it  
11 mirrors the additional language that we've all agreed the Court  
12 should read under the conspiracy charge.

13 So in lines 12 to 15 for the conspiracy charge, it's  
14 all written as one sentence. It just happens to be split up  
15 into two sentences with respect to the substantive charge. And  
16 so if we're going to give them the whole sentence on the  
17 conspiracy charge I think it makes sense to give them both  
18 sentences on the substantive charge because that's the entire  
19 concept.

20 I would also note that, again, to the extent we're  
21 parsing their question, they asked whether money is spent or  
22 could be spent based upon previous spending habits. To me that  
23 does incorporate some question about reasonable foreseeability,  
24 right. Because they're asking about previous spending habits  
25 and to what extent that's a fair measure. And, again, in light

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1 of that, I think it makes sense to give them the full sentence,  
2 lines 12 to 15 and the full -- both sentences, lines 18 through  
3 the top of the next page on the substantive charge.

4 I agree with Mr. Klingeman. There is no need at this  
5 point to go down the road of attempting to define what an  
6 essential -- essential conduct of the crime is, given that we  
7 haven't gotten that question.

8 THE COURT: I think what I'll do is -- I think I will  
9 read parallel from both the conspiracy charge and the  
10 substantive charge and so I would say something like -- and no  
11 one thinks this charge is wrong and so, again, I don't want to  
12 over-assume their meaning or fail to answer their question by  
13 assuming a meaning when there are other meanings available.

14 So I will read -- what I intend to do is read the  
15 question and say something like: I remind you of my full venue  
16 instruction on pages 64 and 65 as well as the supplemental  
17 venue instruction that I gave you on Monday. And I do remind  
18 you -- and maybe I'll say something like I'll point you to two  
19 provisions from the charge to bear in mind as you consider the  
20 question you've asked, and then read lines 12 through 15 and 18  
21 through line 2 on page 65.

22 Again, just to repeat. I'll read the question. I'll  
23 say that in response I do remind them of my full venue charge  
24 on pages 64 through 65 of the original jury charge. I remind  
25 them of the supplemental charge in response to their question

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1 on Monday. I do specifically point them to bear in mind the  
2 following passages as they go about answering the question they  
3 have posed, that they consider, and then I'll read lines 12  
4 through 15 on page 64 and line 18 through line 2 on page 65.

5 MR. SHIN: No objection from the government.

6 MR. CREIZMAN: No objection.

7 MR. KLINGEMAN: Okay.

8 THE COURT: I'm asking Ms. Nuñez to get the jury.

9 Just a second.

10 We had discussed if we got a note to just indicate  
11 that, as with Friday and Monday, as to when they end their  
12 deliberations, leave that to them to decide and put out a note  
13 if they'd like to stop at 5, if they'd like to keep going  
14 beyond that, they may so indicate in a note. Everyone agree to  
15 that?

16 MR. KLINGEMAN: Yes.

17 MR. CREIZMAN: Yes.

18 MR. SHIN: Yes.

19 (Jury present)

20 THE COURT: Thank you. Everyone may be seated. Good  
21 afternoon, ladies and gentlemen of the jury. I did receive a  
22 note from you which reads, "Your Honor we have a question with  
23 regards to establishing 'venue' as it relates to both  
24 substantive and conspiracy charges. Is where the money is  
25 spent or where it could be spent, based upon previous spending

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1 habits, a fair measure in establishing venue.

2 "Best regards, Juror no. 2 on behalf of the jury."

3 My response to the question is, first, that I remind  
4 you of my full venue instructions on pages 64 to 65 of the  
5 charge as well as the supplemental instruction that I gave you  
6 on Monday.

7 I'll point you to two provisions from the charge to  
8 bear in mind as you do the whole charge, as you consider the  
9 question you've asked.

10 First, I remind you that in the jury charge on page  
11 64, lines 12 through 15, I instructed as to the conspiracy  
12 charges that venue is proper in this district if any of the  
13 defendants or their coconspirators caused any act or event to  
14 occur in this district in furtherance of the offense and it was  
15 reasonably foreseeable to the defendant that you are  
16 specifically considering that the act would take place in the  
17 Southern District of New York.

18 As to the substantive counts, I remind you that on  
19 page 64, line 18 to page 65, line 2, I instructed you that  
20 venue is proper in this district provided that any act in  
21 furtherance of the essential conduct of the crime took place in  
22 the Southern District of New York. Again, the defendant you  
23 are considering need not have specifically intended to cause an  
24 act or event to happen in this district or even known that he  
25 was causing an act or event to happen here as long as it was

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1 reasonably foreseeable to that specific defendant that such act  
2 would occur in this district and it, in fact, occurred.

3 So that is the response I have to your question and  
4 I'll ask you to take that back with you to your deliberations.

5 One point to note as you return. Your lunch is being  
6 brought in as you sit here so you can continue your  
7 deliberations over lunch.

8 With respect to the end of the day, as I indicated  
9 last Friday and on Monday, I leave the decision to you as to  
10 when the day ends. If you need to end at 5, simply put out a  
11 note indicating that is the case. If you determine that you'd  
12 like to continue your deliberations beyond 5, please just so  
13 indicate in a note.

14 Thank you so much. Enjoy your lunch. And thank you  
15 for your work.

16 (Jury resumed deliberations)

17 THE COURT: Matters to take up?

18 MR. SHIN: Nothing from the government.

19 MR. CREIZMAN: No, your Honor.

20 MR. KLINGEMAN: No, your Honor.

21 THE COURT: Thank you, everyone. We'll wait.

22 (Recess pending verdict)

23 (At 4:33 p.m. the jury returned a note)

24 THE COURT: I received a note from the jury just  
25 indicating that they want to be dismissed at 5 p.m.



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1           It says, "Your Honor, I would like to request to be  
2 dismissed at 5 p.m. as our deliberations will continue into  
3 tomorrow, March 16. Thank you. Juror no. 2 on behalf of the  
4 jury."

5           So that's where we are. Sorry to say I'll just ask  
6 you to in back at 5 of 5 for their dismissal.

7           Any matters to take up, counsel?

8           MR. KLINGEMAN: No, your Honor.

9           THE COURT: All right. Thank you so much.

10          MR. KLINGEMAN: Your Honor.

11          MR. CREIZMAN: I'm sorry. Is there a time that we  
12 shall appear tomorrow morning?

13          THE COURT: I want to joke: Does it matter what I  
14 say, but I recognize that you claim to have been stuck on a  
15 train underground.

16          MR. CREIZMAN: I have an alibi witness as well.

17          THE COURT: I think there is no reason -- there is  
18 nothing necessitating our being here any earlier than 9:30. I  
19 mean obviously I'll be here earlier than 9:30. I guess -- why  
20 don't we say 9 in the event we face any issues in the morning  
21 with a non-arriving juror.

22          MR. CREIZMAN: I could do that.

23          THE COURT: You'll do your best, I guess.

24          MS. CHOI: Sorry, your Honor. You want us in the  
25 courtroom?

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1 THE COURT: You just need to be as you were all day.

2 MS. CHOI: Okay.

3 THE COURT: Accessible starting at 9 so that if we  
4 have -- I can gather you quickly if we have an issue to deal  
5 with. Okay.

6 MS. CHOI: Yes.

7 THE COURT: Anything else?

8 MS. CHOI: No. Thank you.

9 THE COURT: See you in half an hour -- less than that.  
10 Mr. Creizman, less than that.

11 (Recess)

12 THE COURT: Anything to take up, counsel?

13 MR. KLINGEMAN: No, your Honor.

14 THE COURT: Bring in the jury.

15 (Jury present)

16 THE COURT: Thank you, everyone.

17 Members of the Jury, I did receive your note  
18 indicating that you'd like to be dismissed at 5 o'clock today  
19 to resume deliberations tomorrow morning. So I'm here to  
20 dismiss you. I do ask you, of course, to continue to bear in  
21 mind my instructions. No communications with each other or  
22 anyone else about the case outside of your deliberations, no  
23 research about the case or communications of any kind about the  
24 case. And continue to keep an open mind until you return to  
25 your deliberations with your co-jurors.

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1           The process tomorrow is the same as it was today.  
2       Please be in the jury room by 9:30 and please begin your  
3       deliberations as soon as all twelve of you are present and  
4       you'll indicate to me through the day if you have any notes,  
5       and that's it, wait to hear from you.

6           Thank you so much for your hard work. I wish you a  
7       good night. See you tomorrow.

8           (Jury excused)

9           THE COURT: Anything to take up?

10          MR. KLINGEMAN: Just a question, your Honor.

11          Would the Court let us know which juror is the one who  
12       has indicated she's got a potential trip beginning Sunday?

13          THE COURT: Yes. It was juror no. 5.

14          MR. KLINGEMAN: Thank you.

15          THE COURT: All right.

16          So we will be prepared for any issues that we need to  
17       take up by 9 tomorrow and, obviously, if we have any matters  
18       that come in over the evening or early morning regarding the  
19       jurors I will let you know but hopefully I'll see you when we  
20       first hear from the jury.

21          Have a good night everyone.

22          (Adjourned)